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Brief of Atty. Gen'l (Dodge & Brannigan) for Appt.

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
EDGAR M. WILSON, ADMINISTRATOR of the estate of Thomas B. Van Buren, deceased, appellee. } No. 700.

BRIEF FOR APPELLANT.

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STATEMENT.

The claimant's decedent was consul-general for the United States at Kanagawa, Japan, from June, 1874, until June, 1885. Subsequent to March 31, 1881, he certified invoices of goods intended for entry into the United States by forms required by Revised Statutes, sections 2853 and 2855, except that in the form of invoices, declaration, and certificate, after the designation of the port in the United States at which the goods were to be entered, was added the words, "in transit for * * *," the blank in each case being filled with the name of some foreign country. (See forms, pp. 3–8, in record of Kennedy Case, heard herewith.) This

form of certificate and invoice being called transit invoice and being made because it was represented to the consul-general that they were intended, not for consumption in the United States, but for entry for transit through the United States to a foreign country.

The total number of these invoices was 1,646, for which he charged the statutory fee of $2.50 each.

The property covered by 478 of these invoices did, in fact, pass in transit through the United States and was exported to foreign countries, the fees collected for which by claimant were $1,195.

The property covered by 523 of these invoices was by virtue of the said certified invoices entered for consumption in the United States. The fees thereon were $1,307.50.

And as to the property covered by the remaining 645 invoices, it is not shown by the evidence whether it passed in transit and was exported from the United States, or whether it was entered for consumption therein. The fees collected for this class was $1,612.50.

At the time of the rendition of these services, the regulations under which claimant held his office declared the fees for certifying these so-called transit invoices to be official and required him to account therefor as official emoluments of his office. He, without protest or objection, did so account for said fees and made no objection to his liability to so account therefor until after his office had terminated and his accounts been closed.

The Court of Claims held that all of these fees, amounting to $4,115, were unofficial; that claimant was not required by law to account therefor as emoluments,

and that he was entitled to recover them back; and accordingly rendered judgment for that amount against the United States, from which this appeal is taken.

The findings made in the two cases to be argued together throw mutual light on each other—for example, it is found in this (the Wilson) case that these invoices, with the words "in transit for ———" included in them, were accepted by the customs officers as sufficient to satisfy the requirements of section 2860, which is of course, for they contain everything which that section requires. (Finding III.)

Again, in the findings in the Kennedy Case, some sample invoices, declarations, and certificates are set forth (Finding VI, pp. 3–8), which will be found to meet all the requirements of sections 2853–2855, with the additional words "in transit for ———," which, of course, are merely surplusage.

In the Kennedy Case it is also found (Finding VIII) as follows:

> The declarations and consular certificates on all of the transit invoices mentioned in this suit are in the form prescribed by the United States Consular Regulations for invoices of merchandise intended for entry and consumption in the United States. (See United States Consular Regulations of 1874, paragraph 477 and 466 and Appendix V of said regulations, Forms No. 139 and 140, on page 446).
>
> Consular certificates were not required by the practice of the Department for invoices of merchandise intended for transit through the United States. They were made by the claimant as consul at the request of the shippers, and for their accommodation and convenience.

ASSIGNMENTS OF ERROR.

I.

The court erred in allowing to the claimant in the judgment the sum of $1,307.50, collected by him as fees for certifying the said 523 invoices of goods which were entered for consumption in the United States.

II.

The court erred in allowing to the claimant in the judgment appealed from the sum of $1,612.50 collected and accounted for by him upon the said 645 invoices of goods as to which there was no evidence that they passed in transit through and were exported from the United States.

III.

The court erred in allowing to the claimant in the said judgment the sum of $1,195, the fees collected by him for certifying the said 478 invoices of goods, which in fact passed in transit through and were exported from the United States to some foreign country.

IV.

The court erred in allowing judgment to the claimant for the sum of $4,115, or any part thereof.

V.

The court erred in not rendering judgment in favor of the defendant and dismissing the petition.

ARGUMENT.

At the time of the transactions out of which this claim arises Revised Statutes, section 2860, provided:

> Except as allowed in the four preceding sections, no merchandise imported from any foreign place or country shall be admitted to an entry unless the invoice presented in all respects conforms to the requirements of sections twenty-eight hundred and fifty-three, twenty-eight hundred and fifty-four, and twenty-eight hundred and fifty-five, and has thereon the certificate of the consul, vice-consul, or commercial agent in those sections specified, nor unless the invoice is verified at the time of making such entry by the oath of the owner or consignee, or of the authorized agent of the owner or consignee, certifying that the invoice and the declaration thereon are in all respects true and were made by the person by whom the same purports to have been made, nor unless the triplicate transmitted by the consul, vice-consul, or commercial agent to the collector has been received by him.

Consular Regulations promulgated September 1, 1874, provide for the official service of certifying invoices in compliance with section 2860, Revised Statutes, in paragraph 461 et seq., and the forms thereof are given at pages 446 and 447, being forms Nos. 138 or 139 for the declaration and No. 140 for the consular certificate. The same subject appears in Regulations of May 1, 1881, as paragraph 636 et seq., and the same forms are given with the same numbers at pages 581 and 582.

In the Consular Regulations of 1881, paragraph 640, it is provided that the—

> consular certificates are not required in connection with the entry of goods passing in transit through the United States to or from countries adjacent thereto under combined entry for transportation and exportation, such goods not being considered as ordinary importations.

This regulation did not exist prior to 1881, and does not therefore affect the bulk of the controversy here. In any event, however, it will be contended that it could not change the law as expressed in section 2860.

By section 1745, Revised Statutes, it is provided:

> The President is authorized to prescribe from time to time the rates or tariffs of fees to be charged for official services and to designate what shall be regarded as official services besides such as are expressly declared by law.

Official fees are defined in the Regulations of 1874, in paragraphs 321 et seq., the tariff being found in paragraph 333, in which the fee is $2.50 for certifying invoices according to Form No. 140. That fee, however, is also expressly prescribed by statute, section 2851, Revised Statutes. In the Regulations of 1881 the same subject is treated in paragraph 482 et seq. and the tariff prescribed in paragraph 496.

Paragraph 321 of the Consular Regulations of 1874 is as follows:

> All acts are to be regarded as "official services" when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States.

The Consular Regulations for 1884, paragraph 489, is as follows:

> All acts or services for which a fee is prescribed in the tariff of fees are to be regarded as official services, and the fees received therefor are to be reported and accounted for to the Treasury of the United States, except when otherwise expressly stated therein.

It will thus be seen that during the period from 1874 to 1881 the President had prescribed that all service shall be official when the consul is required to use his seal and title officially or either of them. That during that period he was required by sections 2853, 2854, 2855, and 2860 to use his official title and seal upon invoices of all goods to be imported into the United States, and during that period there was not even an attempt by regulation to except the case of goods which were to pass in transit.

It will also be observed that after May 1, 1881, when there was an attempt by regulation (par. 640) to dispense with the requirement of certified invoices for such goods, the official character of the fee was no longer made to depend merely on the question whether the service was required, but every fee prescribed in the tariff of fees was by paragraph 489 declared to be official, and that the fee for certifying invoices in the Form 140 was prescribed in the tariff.

The questions here presented are three:

First. In the light of the new evidence showing that the so-called transit certificates are the same certificates as required by sections 2853–2855, and the newly made

suggestion that such certificates are *required* by law and could not be dispensed with by the regulation, whether the fees here claimed for certifying invoices of goods which did in fact pass through the United States without being entered for consumption therein, can be treated as unofficial, as they were in the Mosby Case (133 U. S., 285).

Second. If the certification of invoices of goods which pass through the United States in transit can, by virtue of paragraph 640 of the Consular Regulations above quoted, or by reason of the practices of customs officers, be deemed unofficial, whether the certification of invoices of goods which do not so pass in transit through the United States, but are entered for consumption therein, can also be classed as unofficial because the consul, at the time of making the certificate, believed the goods were intended for transit, and, accordingly, put the words "for transit to ———" upon the invoices and upon his certificate.

Third, if certificates are official where goods do not pass in transit through but are entered for consumption in the United States, and are unofficial when they do so pass in transit and are exported from the United States, whether the burden of proof is not upon a consul to establish the exception to the law expressed in section 2860, claimed to be created by paragraph 640 of the Consular Regulations.

I.

In the Mosby Case, supra, neither the Court of Claims nor this court were given the benefit of any information as to what transit invoices were. The Court of Claims, speaking by Judge Weldon, said: "They are not the invoices referred to in the sections of the statute above

quoted, sections 2853 and 2855, but such invoices which accompany goods in transit through the United States." The Supreme Court, speaking by Mr. Justice Blatchford, adopted this statement and said, "These are not the invoices referred to in sections 2853 and 2855 of the Revised Statutes." It now appears by the evidence in the two cases before the court at present that they were the identical invoices described by those sections and which the law by section 2860 required should accompany "all merchandise imported from any foreign place or country" in order that they should be admitted "to an entry."

The error in fact is now corrected. Whatever may have been the invoices in the Mosby Case, it appears here that the invoices and certificate were those *required* by sections 2853 and 2855.

It also appears, from the briefs in the Mosby Case, that the attention of the court was not called to the fact that the service of the consul was *required by law*. It being so required by law, no power exists in the Secretary of State, or other head of a Department, to do away with that requirement by a regulation. (*Morrill* v. *Jones*, 106 U. S., 466.)

The coming of any merchandise into a port of the United States is, of course, an importation and an entry, whatever may be the ultimate purpose of its proprietor. It is imported, although it may never touch American soil, but be transferred from one vessel to another in the harbor.

Schooner Mary, 1 Gall., 206, 209.
United States v. *Vowell*, 5 Cr., 368.
Saltonstall v. *Russell*, 152 U. S., 628.
Seeberger v. *Schweyer*, 153 U. S., 609, 613.

II.

If, however, it shall be held that property imported into the United States for the purpose merely of transport and exportation is excepted from the plain language of section 2860, and that, therefore, there is no requirement that it shall be accompanied by a certified invoice, that exception can be due only to the regulation above quoted (par. 640), and that excepts only "goods passing in transit through the United States to or from countries adjacent thereto, under combined entry for transportation and exportation." There is no practice of the customs officers to dispense with the certified invoice under any other circumstances. If the goods do not pass in transit through the United States, then they do not fall within even that exception to the law, and the certified invoices provided for by sections 2853–2855 are required, and the invoices certified in this instance, and for which the fees were collected, were accepted and recognized as complying with those requirements, which they obviously did.

The suggestion in the opinion that the customs officers, as a condition of admitting these goods to entry, could have required a payment into the Treasury of $2.50 on each invoice by the importer, seems to me erroneous. The law gave the importer a right to enter these goods upon production of certified invoices in compliance with sections 2853–2855. These invoices did so comply, and the Secretary of the Treasury could not by a regulation

deprive the importer of his right to enter them upon payment of the duty prescribed by law.

Morrill v. *Jones* supra.
Merritt v. *Welsh*, 104 U. S., 694.

The good faith of the parties in this instance may be beyond question, but the practical result is the same as if there had been a skillfully devised scheme between the consul and the importer to defraud the Treasury of a part of its revenue. The goods have been imported into the country, and that has been accomplished by means of a consular act which the law requires, and yet the fees prescribed both by statute and by regulation for that act are, on claimant's contention, to be withheld from the Treasury. A construction of the law which invites such collusion and such practical frauds is not to be readily adopted.

That the rule established by the Mosby Case was effective in suggesting and promoting such collusion with some consuls is pretty well established by the rapid increase in the quantity of goods thereafter imported under certified invoices containing the "in transit for ———" clause. The decision in that case was rendered by the Court of Claims in December, 1888, and affirmed by this court in December, 1890, and on July 17, 1891, the Secretary of State, in a public consular circular, said:

> An investigation made by the First Comptroller of the Treasury reveals the fact that a majority of the shipments in transit under consular invoice are entered for consumption on arrival in the United

> States and never pass on to the alleged foreign destination. This discovery leads to the belief that the obtaining of a consular invoice for goods shipped ostensibly in transit through the United States to some other country is prima facie evidence of an intent to dispose of the goods in the United States if it be found on arrival there to be advantageous to do so.

There is presented here no case of persuasive equity as where an officer has taken and held his office and performed services with the understanding, induced by rulings and practice of his superiors, that he was to have the fruits thereof as his own. Through all the time of this claimant's service he perfectly well understood that all this class of fees belonged to the United States; he took this office with that understanding; he certified each invoice in accordance therewith, and he paid over those fees without the suggestion of a doubt that they belonged in the Treasury and not to him. If he is to recover them it must be because strict law gives them to him, and not because he has fairly earned them upon the understanding had both by himself and his superiors at the time of rendering the service.

III.

If claimant can contend that by virtue of Regulations, paragraph 640, the certified invoices of goods which, in fact, passed in transit through the United States have become unofficial by being excepted from the law requiring them for all importations, it seems clear that the burden rests on him to prove the exception. The fact

of their entry into the country under any circumstances brings them within the provisions of section 2860 and makes the certified invoice a thing required by law. If for any reason a benefit is to be gained by an individual by reason of these particular shipments being excepted from the law, the facts creating such exceptions should be proved by the person claiming it. This he has wholly failed to do as to the 645 invoices mentioned in the second assignment of error. We only know that they were by virtue of the certified invoices imported into this country. Whether they passed out again is wholly unproved.

IV.

This case differs from the Mosby Case in that it was found as a fact that Mosby paid over the fees for which he sued, under protest, and with notice of his claim that they belonged to him, by reason of the insistence of superior officers that they belonged to the Government, and that his payment was for the purpose of avoiding a controversy with the Department. In the case at bar the finding is that the payments were made wholly without objection and without suggesting any claim that they were not official.

This marks the difference between a voluntary and an involuntary payment.

The right of one to recover back money paid to another who is not rightfully entitled thereto and can not in equity and good conscience retain it, is an exceptional one and closely watched, and only arises out of two classes of

transactions; first, where the party, although he pays it voluntarily and without objection, does so under a mistake of fact; and secondly, where, knowing the facts and knowing or suspecting the law, he makes protest and only pays under compulsion or duress, which the other party, by reason of his position, is able to exercise over either the person or property of the payer.

The two classes are perfectly distinct, and a given transaction must belong exclusively to one or the other, and being located, only confusion results from an attempt to examine into the existence of those elements which are material only to transactions of the other class.

If the claim here falls wholly within the first class, namely, that of a payment entirely voluntary, without thought or knowledge of any unlawfulness of the demand, it is entirely immaterial that he did not protest, and also immaterial whether the party receiving the money was in a position to coerce by reason of being a superior. Protest and coercion are both impossible accompaniments of a payment voluntarily made by one who believes he ought to make it.

Apparently the transaction here presented to the court falls within this first class, of a payment made voluntary, which, if mistaken at all, was mistaken only as to the law. If, however, it is sought to bring it within another class, namely, where claimant, knowing his rights and objecting to the payment, is compelled by superior force to make it, the essential element of protest—or, at least, notice of the objections to the legality of the demand on him—is lacking. I freely conceded that subordination

of the party making the payment to a superior officer constitutes the duress sufficient in law to make a payment involuntary, but there must also be that other element commonly called protest, for it is an act of bad faith to pay money which one believes he ought not to pay and intends to attempt to reclaim without notifying the party so receiving it of that intention.

The idea suggested sometimes of peril to a subordinate officer from such an objection has no support in fact. No public officer ever suffered from the courteous statement of his belief in his legal rights. The Mosby Case is a confirmation of this assertion. No penalty fell on him, although he notified the officers both of the State and of the Treasury Department of his contention in a somewhat vigorous manner.

I respectfully urge that the practice ought not to be sanctioned by judicial decision that all public officers may at any time within the statute of limitations bring their suit to recover back moneys which have been paid into the public treasury and the payment of which has served as a basis for the finances of the country although they failed to make any objection whatever to the payment or to suggest their belief in their right to withhold it.

It is respectfully submitted that the judgment should be reversed.

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